

Matlock Law Group, PC  
Anne Leith Matlock, K Brian Matlock  
1485 Treat Blvd., Suite 200  
Walnut Creek, CA 94597  
Office: (925) 944-7131  
Fax: (925) 944-7138  
E-mail: anne-leith@matlocklawgroup.com

Attorneys for Defendant/Counterplaintiff,  
Dataway, Inc.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

AT&T Corp.

**CASE NO. C07-02440 EDL**

**PLAINTIFF,**

v.

Dataway, Inc.

**DEFENDANT.**

**DATAWAY'S REPLY TO PLAINTIFF  
AND COUNTERDEFENDANT'S  
OPPOSITION TO DEFENDANT AND  
COUNTERPLAINTIFF'S MOTION TO  
STRIKE**

Dataway, Inc.

**COUNTERCLAIMANT**

v

AT&T Corp.

## COUNTERDEFENDANT

**Date: August 12, 2008**  
**Time: 9:30 a.m.**  
**Courtroom: E**

Defendant and Counterplaintiff Dataway, Inc. (hereinafter "Dataway" or "Defendant") hereby replies to Plaintiff and Counterdefendant AT&T Corp.'s (hereinafter "AT&T" or "Plaintiff") Opposition to Dataway's Motion to Strike (Docket No. 116) AT&T's untimely Answer/Reply to Counterclaim (Docket No. 115).

1           **A. Aire's answer/reply is extremely late and redundant, immaterial, impertinent,**  
 2           **and scandalous and must be stricken**

3           In its Motion to Strike, Dataway has shown the procedural impermissibility and the  
 4 redundancy of AT&T's answer/reply. It is generally accepted that Defendant's failure to deny  
 5 allegations of a complaint/counterclaim constitutes a judicial admission of the matters alleged.  
 6 See Lillge v. Verity, 2007 U.S. Dist. LEXIS 73543 (N.D. Cal. Oct. 1, 2007). Pursuant to  
 7 12(a)(1)(B) "a party **must** serve an answer to a counterclaim or crossclaim within 20 days after  
 8 being served with the pleading that states the counterclaim or crossclaim. AT&T's  
 9 answer/reply, Docket No. 115, should therefore be stricken ipso jure.

10          AT&T's argument that a court may relieve a party from a ***judgment*** or order for reason of  
 11 "mistake, inadvertence, surprise, or excusable neglect," provided that the party **moves** for relief  
 12 (Fed. R. Civ. P. 60(b)) is not applicable to the present dispute. In the case at hand (1) there is no  
 13 judgment or order that could be set aside, (2) AT&T did not move to set anything aside, and (3)  
 14 only excusable neglect, which was not and cannot be demonstrated by AT&T, could justify  
 15 such reset.

16          A comparison of the wording of Fed. R. Civ. P 55(b) with 8(b) demonstrates the  
 17 different standards applied between a default judgment and the automatic admission of facts  
 18 due to a party's failure to respond. Pursuant to 55(b)(2) a party **may** apply for a default  
 19 judgment whereas pursuant to Fed. R. Civ. P. 8(b)(6) "[a]n allegation [...] **is** admitted if a  
 20 responsive pleading is required and the allegation is not denied. The language in Fed. R. Civ. P.  
 21 8(b)(6) clearly shows that the admission of facts is a required consequence when a party fails to  
 22 respond pursuant to the rules of Federal Civil Procedure. However, under Fed. R. Civ. P.  
 23 55(b)(2) it is required that a party moves for a default judgment where the entry of default then  
 24 is in the court's discretion. Dataway merely requests an appropriate determination of a  
 25 consequence that is already mandatory by law but not reflected on the court's docket yet.  
 26 Statutorily, the pleading that Dataway requests to be stricken could have no possible bearing on  
 27 the litigation. For this reason it has to be stricken.

28

1           **B. As Dataway does not seek an entry of default; the requirements for and policy**  
 2           **reasons regarding entry of default are irrelevant**

3           Seeking to obtain a default judgment pursuant to FRCP 54(c) is merely an option if a  
 4 party fails to appear in time. However, Dataway did not intend to obtain a default judgment.  
 5 Dataway refuses to pursue a default judgment in an inappropriate way. AT&T engaged in an  
 6 extensive motion practice in this case, asserted defenses on other issues and clearly did not  
 7 intend to let this case be ended by default. However, Dataway is not engaging in “sharp  
 8 practice” by requesting this Court to treat AT&T’s answer/reply as grossly late. Rather,  
 9 Dataway wants the case to be tried upon the merits. For these reasons and court’s general  
 10 disfavor of default judgments, Dataway did not request entry of default due to AT&T’s failure  
 11 to respond. The Smith case as cited by AT&T, however, is not only overruled but also not  
 12 applicable to the case at hand because it deals merely with default judgments. Smith v. Los  
 13 Angeles Bookbinders Union, 133 Cal. App. 2d 486, 498 (Cal. App. 2d Dist. 1955).

14           Moreover, Dataway does not pursue a dog-eat-dog practice but merely seeks to maintain  
 15 a fair proceeding and adhere to procedural requirements. AT&T’s counsel entertains the  
 16 engagement of sharp practices since the commencement of this action. He continuously refuses  
 17 to cooperate, insults Dataway’s counsel and Dataway’s officer’s in their Depositions (see  
 18 Exhibit A), and displays unprofessional behavior as previously complained about by Dataway.  
 19 Most recently, AT&T disclosed James Lake as its expert, depicted as the person most  
 20 knowledgeable regarding the incident with Dataway. Mr. Lake was not produced timely when  
 21 Dataway requested to depose the person most knowledgeable. These delaying and dodging  
 22 tactics continue to divert the entire litigation and need to find an end.

23           **C. Courts often require a showing of prejudice to moving party but Dataway does**  
 24           **not have to demonstrate unfair prejudice as Dataway is not seeking a default.**

25           AT&T’s claim that Dataway must demonstrate unfair prejudice to be able to win its  
 26 Motion to Strike is false. AT&T’s argument and the authority AT&T cites focuses on the  
 27 requirement to demonstrate unfair prejudice in the context of seeking to prevent the overturning  
 28 of a default. Dataway, mindful of the preference of courts to decide issues on the merits, has not

1 sought a default against AT&T. Dataway is only seeking to have the facts and allegations in its  
 2 counterclaim admitted in accordance with Fed. R. Civ. P. 8. Dataway does not have to  
 3 demonstrate unfair prejudice to have the facts and allegations deemed admitted. Rather, the  
 4 possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause  
 5 the trier of fact to draw unwarranted inferences at trial is the type of prejudice that is sufficient  
 6 to support granting a motion to strike California Dep't of Toxic Substances Control v. Alco  
 7 Pac., Inc. (CD Cal 2002) 217 F Supp2d 1028, 1033. After all, the function of a motion to strike  
 8 is to avoid expenditure of time and money arising from litigating spurious issues by dispensing  
 9 with issues prior to trial. Filing a pleading 120 days after its deadline is spurious and litigating.  
 10 Such unjustified pleading prejudices Dataway's position and its trial preparation.

11 Moreover, Dataway was under no obligation to notify AT&T of its untimely responsive  
 12 pleading. Adhering to basic procedural rules and avoiding committing such gross negligence  
 13 was solely AT&T's responsibility.

14 **D. Damages**

15 Despite AT&T's contention, Dataway properly alleged Damages. More importantly, for  
 16 the purpose of this motion, Damages allegations are of no relevance for Defendant's Motion to  
 17 Strike. Despite this, AT&T inaccurately argues damages in its Opposition to Dataway's Motion  
 18 to Strike by wrongfully alleging that Dataway did not present admissible evidence of Damages.

19 **CONCLUSION**

20 In light of the foregoing, Defendant Dataway, Inc., respectfully requests that an Order be  
 21 entered striking AT&T's grossly untimely reply that is in clear violation of the requirements of  
 22 Fed. R. Civ. Pro. 8.

23 Dated: August 1, 2008

MATLOCK LAW GROUP

25 By:



26 Anne-Leith Matlock, Esq.

27 Attorneys for Defendant/

28 Counterclaimant Dataway, Inc.